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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PANTEA E. AMINI et al., Plaintiffs and Appellants, v. CIMARRON ESCROW, INC., Defendant and Appellant.	B205927 (Los Angeles County Super. Ct. No. EC043133)

APPEAL from an order of the Superior Court of Los Angeles County. Laura Matz, Judge. Affirmed in part, reversed in part.

Law Offices of Farrah Mirabel and Farrah Mirabel, for Plaintiffs and Appellants.

Hall & Bailey and Donald R. Hall, for Defendant and Appellant.

INTRODUCTION

This action arises out of a real estate transaction in which Pantea E. Amini and her mother, Parvin A. Mirabadi (collectively buyers), attempted to purchase land directly from the owners, before the property could be auctioned at a tax-lien sale. Although buyers placed in escrow adequate funds to satisfy the tax lien, the funds were not delivered to the county tax collector in time to avoid the tax-lien sale. As a result, the property was sold at auction to a third party. Buyers brought suit against, among others, Cimarron Escrow Company, Inc. (the escrow company); the escrow company cross-complained for indemnity under a provision in the escrow agreement. Following a nonjury trial, judgment was entered in favor of the escrow company both on buyers' complaint for damages and the escrow company's cross-complaint for indemnity.

In cross-appeals, buyers contend: (1) the escrow company had a duty to pay the tax lien; (2) the escrow company breached that duty; and (3) the escrow company was not entitled to attorney's fees under the escrow agreement; and the escrow company contends the trial court erred in reducing the attorney's fees that the escrow company sought. We reverse the award of attorney fees but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In July 2005, Sue Johnston and Helen Peterson (sellers) owned a parcel of vacant land in Palmdale, California (the property) which was subject to a lien for unpaid property taxes. With a tax-lien sale of the property scheduled for August 8, 2005, the property was listed for sale for $290,000. Sellers accepted buyers' offer to purchase the property for $225,000. At the time they made the offer, buyers knew about the scheduled tax-lien sale.

Sellers and buyers executed a Vacant Land Purchase Agreement and Joint Escrow Instructions, dated July 9, 2005 (the joint escrow instructions). The joint escrow

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1 Many of the following facts are gleaned from the parties' Stipulated Undisputed Facts For Trial.

instructions directed that the escrow company was to be the escrow holder and Gateway Title Company (Gateway) was to issue a title insurance policy.

Escrow was opened on July 14, 2005; that day, Sheryl Jennings was assigned as the escrow officer, a title order was opened at Gateway and buyers deposited $10,000 into escrow. Buyers and sellers executed supplemental instructions dated July 19, 2005 (the supplemental escrow instructions). The supplemental escrow instructions included the following provisions:

- "I [buyers] agree to pay any personal property taxes chargeable to me. You [the escrow company] are instructed to use the money and record the instruments to comply with said instructions and to pay all encumbrances of record necessary without further approval including prepayment penalties to show as herein provided."
- "SUFFICIENCY OR CORRECTNESS: . . . [¶] . . . Your duties shall be limited to the safekeeping of money and documents received by you as Escrow Holder and for the disposition in compliance with the written instructions accepted by you in this escrow. . . . ."
- "RECORDATION: The parties authorize the recordation of any instrument delivered through this escrow if necessary or proper for the issuance of the required policy of title insurance or for the closing of this escrow. Funds, instructions or instruments received in this escrow may be delivered to, or deposited with any title insurance company or title company to comply with the terms and conditions of this escrow."
- "RESPONSIBILITIES OF ESCROW HOLDER: The parties agree that you have the responsibilities of an Escrow Holder only and there are no other legal relationships established in the terms and conditions of the escrow instructions. In connection with this escrow . . . you shall have no duty or responsibility of notifying any of the parties to this escrow of any sale, resale, loan, exchange or other transaction involving any of the subject real property or personal property . . . ."

- FUNDS DEPOSITED BY SUB-ESCROW AGENT: If it is necessary, proper or convenient for the consummation of this escrow, you are authorized to deposit or have deposited funds or documents, or both, handed you under these escrow instructions with any duly authorized sub-escrow agent, including, but not limited to any . . . title company . . . , subject to your order at or before close of escrow in connection with closing this escrow. Any such deposit shall be deemed a deposit under the meaning of these escrow instructions."

Mehei Moghadam is appellant Mirabadi's husband and appellant Amini's father. On Tuesday, August 2, 2005, Moghadam hand delivered a $215,000 cashier's check to the escrow company. Moghadam testified that when he delivered the check, escrow officer Jennings "promised me not once, many times, that 'we are going to pay the money, the tax, and this is your deed. Go home. Don't worry about it. This property is not going to go to auction.' " Moghadam elaborated: "Many times they promised they pay it, they work with Gateway, and this will be paid. They promised. Many time I asked this is not going to go – they promised this is not going to go to auction." The final $936.50 required to cover closing costs was wired to the escrow company the next morning, Wednesday, August 3, 2005. Thus, by August 3, 2005, buyers had deposited into escrow all of the funds necessary to close, including enough to satisfy the tax lien. At the time, the tax lien sale could be averted only if the county tax collector received a cashier's check in a specified amount by 5:00 p.m. on Friday, August 5, 2005.[2]

At about 10:20 a.m. on Thursday, August 4, 2005, the escrow company wired $143,000 to Gateway's bank, which was sufficient to satisfy the tax lien; Gateway's bank received the funds at 10:23 a.m. For some unexplained reason, Gateway could not locate the wire until the next morning. But at about 10:00 a.m. on Friday, August 5, 2005,

[2] Previously, buyers had been informed that the property could be redeemed for a lesser amount if received by the county tax collector on or before July 29, 2005, and that the amount would increase after that date.

Gateway title assistant Sue Wellborn informed Jennings that the funds had been located and confirmed that Gateway would pay the tax lien that day. At 10:44 a.m. on August 5, 2005, the escrow company received from Gateway a faxed final sub-escrow closing statement. After receiving from Gateway a confirmed recording and invoice at about 11:30 a.m., the escrow company closed the escrow. The closing statement issued to buyers indicated that the tax lien had been paid.

But all was not as it seemed. On August 5, 2005, the Gateway employee to whom buyers' file had been assigned was out sick. That morning, Ida Lopez, manager of Gateway's lien payoff department, checked her desk to see what she could do to help out. There, Lopez found buyers' file and noticed on it the notation: "funds must be disbursed today." Unaware that the county had to receive a cashier's check by 5:00 p.m. that day to avoid the auction, Lopez sent a Gateway check to the county by overnight mail. Had Lopez known of the 5:00 p.m. deadline and the necessity of a cashier's check, she would have done something different. But as it was, the county did not receive the Gateway check until Monday, August 8, 2005 – too late to avoid the tax lien sale. As a result, the property was sold at auction to a third party for $175,000.

Meanwhile, apparently unaware of the snafu, Gateway caused a grant deed conveying the property to buyers to be recorded on August 8, 2005; at about 8:00 a.m. that day, Transnation Title Insurance Company issued buyers a policy of title insurance on the property; the policy limit was $225,000.

Buyers discovered that they were not the owners of the property in mid-October when they attempted to pay the property taxes. On November 2, 2005, buyers made a claim on the title insurance policy and on December 22, 2005, Transnation paid buyers $225,000 – the policy limit.

Buyers later filed the instant action against the escrow company, among others. The operative Second Amended Complaint alleges causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and

breach of fiduciary duty.[3] As it relates to the escrow company, the first cause of action for breach of contract alleges that buyers and the escrow company had an agreement that the escrow company "with the help of Gateway, would pay off the tax lien by August 5, 2005;" and that the escrow company breached its obligation under that agreement by wiring the money to Gateway too late, failing to follow up with Gateway to make sure the lien was paid, failing to inform buyers that the lien had not been paid, delivering a defective deed to buyers, closing escrow when buyers were not the true owners of the property, failing to inform buyers that the property had been sold to a third party, and hiding the true facts from buyers.

On April 4, 2007, the escrow company filed a cross-complaint against buyers for indemnity on various theories. The cause of action for contractual indemnity was based on a provision in the supplemental escrow instructions.

Trial commenced on November 5, 2007, and concluded on November 7, 2007. In a written statement of decision, the trial court ruled in favor of the escrow company on all theories, concluding buyers did not prove: (1) the existence of a written or oral agreement obligating the escrow company to pay the funds to satisfy the tax lien directly to the county; (2) breach of the covenant of good faith and fair dealing; (3) negligence in not timely paying the tax lien, communicating with Gateway, or failing to advise buyers that the tax lien had not been timely paid; (4) negligent or intentional misrepresentation that the escrow company would timely transfer funds to Gateway in time to pay off the tax lien; or (5) breach of the escrow company's fiduciary duty to timely disburse the funds paid into escrow. On the cross-complaint, the trial court concluded that the escrow company, as prevailing party, was entitled to attorney's fees under the escrow instructions.

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[3] Additional causes of action alleged against the escrow company and other parties were resolved following summary judgment and summary adjudication. Buyers settled with Transnation for $27,000.

In a motion filed on December 26, 2007, the escrow company sought attorney's fees in the amount of $297,180 and $19,902.04 in costs. Buyers opposed the motion for attorney's fees and also objected to some of the costs. The trial court denied the buyer's motion to tax costs. It awarded the escrow company attorney's fees, but less than the amount sought. The trial court denied the escrow company's request for non-statutory fees pursuant to *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542. An amended judgment awarded costs to the escrow company in the amount of $11,446.08 and attorney's fees in the amount of $263,250.00.

Buyers filed a timely notice of appeal from the judgment entered on December 13, 2007, and from the February 4, 2008, rulings denying their motion tax costs and awarding attorney's fees to the escrow company. Escrow company filed a notice of cross-appeal from the February 4, 2008, order denying its motion for non-statutory costs and denying attorney's fees for 45 hours of travel time.

DISCUSSION

A. Standard of Review

If escrow instructions are in writing, an action for failure to comply with the instructions is on a written contract. (*Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 531-532.) In construing a contract, "[w]hen no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence. [Citations.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955-956.)

Here, the parties agree that the appropriate standard of review is de novo.

B. Buyers Did Not Establish That Escrow Company Had a Duty to Pay the Tax Lien Directly to the County Tax Collector

As we understand appellant's contention, it is that the trial court erred in finding the escrow company had no duty to pay the funds to satisfy the tax lien directly to the county tax collector. They make the following three alternative arguments: (1) a provision in the supplemental escrow instructions expressly obligated the escrow company to pay the tax lien directly to the county; (2) a duty to pay the tax lien directly to the county is an implied term of the escrow instructions; and (3) the escrow company assumed a duty to pay the tax lien directly to the county. We find no error.

An "escrow" involves the deposit of documents or money or both with a third person to be delivered on the occurrence of some condition. (Fin. Code, § 17003, subd. (a); *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).) An escrow holder's "limited role in the transaction is as an agent who ' "carries out the escrow instructions." ' [Citations.] [¶] An escrow agent's role ends once he or she has successfully exchanged payments and instruments, and he or she 'has no general duty to police the affairs of its depositors.' [Citation.]" (*Paul v. Schoelkopf* (2005) 128 Cal.App.4th 147, 154 (*Schoelkopf*); see also *Summit, supra*, at p. 711 [escrow holder's duties to the parties to the escrow is limited to the escrow holder's obligation to carry out the instructions of the parties]; *Markowitz v. Fidelity Nat. Title Co.* (2006) 142 Cal.App.4th 508, 526 (*Markowitz*) [same].) An escrow holder generally "incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions. [Citation.]" (*Summit, supra*, at p. 715.)

Escrow holders routinely farm out rudimentary escrow functions, such as paying out funds and recording documents, to a title company, sometimes referred to as a sub-escrow. (See e.g. *Markowitz, supra*, 142 Cal.App.4th 508 [title company acted as sub-escrow to hold loan proceeds and pay off existing promissory note]; *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1189 (*Siegel*) [title insurer acted as sub-escrow to hold funds and record deeds on behalf of escrow holder]; *Universal Bank v.*

Lawyers Title Ins. Corp. (1997) 62 Cal.App.4th 1062, 1064, fn. 8, citing *Siegel, supra*, [title company had dual role as title insurer and sub-escrow for recording documents, transmitting loan proceeds and copies of deeds].) Buyers acknowledge that the escrow instructions specifically authorized the escrow company to use Gateway as a sub-escrow.

"An escrow holder must comply strictly with the instructions of the parties. [Citations.] 'Upon the escrow holder's breach of an instruction that it has contracted to perform or of an implied promise arising out of the agreement with the buyer or seller, the injured party acquires a cause of action for breach of contract. [Citations.]' " (*Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1058.)

We apply the usual rules of contract interpretation to determine what the parties intended when they entered into the escrow. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) " 'Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.' [Citation.] The contract must also be 'interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] ' "In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. [Citation.]" ' [Citation.]" (*Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 601-602.) The words of a contract are to be understood in their ordinary and popular sense. (Civ. Code, § 1644.) " 'Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]' [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

1) Buyers Did Not Establish That Escrow Company Had a Contractual Duty to Pay the Funds to Satisfy the Tax Lien Directly to the Tax Collector

The trial court found there was no evidence that the escrow company had a contractual duty to pay the funds to satisfy the tax lien directly to the tax collector in time to avoid the tax-lien sale, as opposed to disbursing those funds to Gateway in sufficient time for Gateway to pay the tax collector. Buyers would have us reach a contrary result based on the following provision in the supplemental escrow instructions: "You [the escrow company] are instructed to use the money and record the instruments to comply with said instructions and to pay all encumbrances of record necessary without further approval including prepayment penalties to show as herein provided."[4] But a review of the supplemental escrow instructions in a manner which gives force and effect to every provision, not just the isolated clause relied upon by buyers, and to the mutual intention of the parties (Civ. Code, §§ 1636, 1641), demonstrates that the trial court was correct.

In addition to the provision relied upon by buyers, the supplemental escrow instructions provide: "If it is necessary, proper or convenient for the consummation of this escrow, you are authorized to deposit or have deposited funds or documents, or both, handed you under these escrow instructions with any duly authorized sub-escrow agent, including, but not limited to any . . . title company, . . . subject to your order at or before close of escrow in connection with closing this escrow. Any such deposit shall be deemed a deposit under the meaning of these escrow instructions." And: "Funds, instructions or instruments received in this escrow may be delivered to, or deposited with any title insurance company or title company to comply with the terms and conditions of this escrow." These provisions expressly authorized the escrow company to satisfy its

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[4] Escrow Company asserts that buyers have waived the right to argue liability based on this provision of the supplemental escrow instructions because buyers did not premise liability on this particular provision in the trial court. We are satisfied from the record that the trial court considered all of the material terms of the escrow instructions.

duty to pay all encumbrances by delivering the funds to Gateway, so that Gateway could make the payments.

Buyers' trial testimony establishes that this was the mutual intention of the parties at the time they entered into the contract. Mirabadi testified that buyers never instructed the escrow company to pay the funds directly to the county; rather, she understood that the escrow company was *not* going to pay the funds in escrow directly to the county and that Gateway was going to do so. Amini testified that she was told that the escrow company and title company were going to take care of satisfying the tax lien.

2) There Was No Implied Covenant That Escrow Company Would Pay the Tax Lien Directly to the Tax Collector

Buyers maintain that an implied term of the escrow instructions was that the escrow company would use its best efforts to pay the tax lien. Buyers explain that "use of best efforts here means that [the escrow company], through Gateway or any other Title company authorized by [the sellers and buyers], would timely pay the tax lien." As we understand buyers' claim, it is that this implied covenant required the escrow company to not just transfer the necessary funds to Gateway in time to pay the tax lien, but to make the payment directly to the county tax collector. We find no such implied covenant.[5]

To impose an implied covenant, " ' "(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the

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[5] In addition to finding that the escrow company had no duty to pay the tax collector directly, the trial court found that the escrow company did not breach its duty to timely disburse the funds paid into escrow (i.e., to disburse the funds to Gateway in sufficient time for Gateway to pay the tax collector). On appeal, buyers assert that the escrow company had a duty to use "reasonable efforts to bring about the fulfillment of the contract which required paying the tax lien" and that the trial court erred in finding the escrow company did not breach its duty. To the extent buyers argue there was insufficient evidence on this point, we disagree. Buyers' expert testified that Gateway received the funds in time to pay off the tax lien. This constitutes substantial evidence that the escrow company acted reasonably in distributing the funds to Gateway.

parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract." ' [Citations.]" (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804 (*Third Story*).) Courts "are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement. In all other situations where the contract is unambiguous, the express language is to govern, and " '[n]o obligation can be implied . . . which would result in the obliteration of a right expressly given under a written contract.' [Citation.]" (*Id*. at p. 808.)

Here, the escrow company's duties as escrow holder were set forth in the joint escrow and supplemental escrow instructions. These duties included safekeeping of money and documents received by the escrow company and disposition in compliance with the written instructions. As we have already discussed, the supplemental escrow instructions expressly authorized the escrow company to comply with its obligations by delivering certain documents and funds to Gateway. Contrary to buyers' assertion, this did not render the escrow company's promise to act as escrow holder illusory. Escrow company had the duty to deliver the documents and money to Gateway, as well as to distribute other documents to the principals and release funds to the sellers and brokers. Thus, the subject was completely covered by the contract and the covenant suggested by buyers is directly at odds with the contract's express grant of discretionary power. Accordingly, buyers did not establish that an implied term of the escrow agreement was that the escrow company had a duty to satisfy the tax lien, as opposed to a duty to deliver the funds to do so to Gateway.

3) Escrow Company Did Not Assume a Duty to Pay the Tax Collector Directly

Buyers alternatively contend that the escrow company's duty to pay the tax lien directly to the tax collector "arose from [the escrow company's] representations, under a theory of assumption of duty, or at least quasi-contract by inducing detrimental reliance." The representations upon which buyers claim they relied are the statements Moghadam testified were made to him by Jennings on August 2, 2005.

But buyers cite no legal authority in support of their theory of assumption of duty or quasi-contract. Accordingly, we deem the contention relating to assumption of duty and quasi-contract waived. (See *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 [absence of legal analysis treated as waiver of contention]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"].) In any event, the trial court considered the evidence on the subject and rejected the argument. Substantial evidence supports that conclusion.

C. Gateway's Failure to Timely Pay the Tax Lien Did Not Constitute a Breach of Duty by Escrow Company

Buyers argue that the escrow company was liable for Gateway's failure to timely satisfy the tax lien under two theories: (1) delegation of the duty to Gateway did not relieve the escrow company of its obligation to perform should Gateway fail to do so; and (2) the escrow company was liable for Gateway's failure under an agency theory. We disagree.

Buyers' first argument fails because the escrow company did not assign any obligation it had under the escrow agreement to Gateway. An obligation is a legal duty to do a certain thing. (Civ. Code, § 1428.) "If an obligation requires the performance of one or two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation." (Code Civ. Proc., § 1448.)

"Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it." (Civ. Code, § 1473.)

Here, there was no assignment because the escrow company did not transfer its obligation under the escrow agreement to Gateway. On the contrary, the supplemental escrow instructions gave the escrow company the option of complying with its obligations "to use the money and record the instruments to comply with said instructions and to pay all encumbrances of record necessary . . . ." by delivering or depositing the funds received in escrow to a title company. Thus, transfer of the funds to Gateway constituted full performance of the escrow company's obligation under the contract, not an assignment of its obligation to perform.

Also without merit is buyers' argument that the escrow company was responsible because Gateway was its agent. "An agent is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions. [Citation.] The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties. [Citations.] [Citation.] The significant test of an agency relationship is the principal's right to control the activities of the agent. [Citations.] It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship. [Citation.]" (*McCollum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91, internal quotations omitted.) Substantial evidence supports the trial court's conclusions that Gateway was not the escrow company's agent.

D. Attorney's Fees

Buyers contend the trial court erred in awarding the escrow company attorney's fees. They argue that the contract provision upon which such fees were based was intended to indemnify the escrow company against third party claims, and not as an

attorney's fee provision as between the escrow company and the parties to the transaction. We agree.

We first dispense with the escrow company's contention that buyers are estopped from arguing the attorney's fee issue because buyers asserted a contractual right to attorney's fees in their complaint. "The mere allegation of a contractual right to attorney's fees is not sufficient to create an estoppel where [a party] would not actually have been entitled to attorney fees under the contract if [that party] had prevailed." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 963 (*Myers*).)

A determination of an award of attorney fees under a contractual provision where, as here, no extrinsic evidence has been offered to interpret the contract, and the facts are not in dispute, is reviewed de novo. (*Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1177 (*Kangarlou*).) We have already set forth the general principles applicable to interpretation of contracts.

The general rule is that each party to a lawsuit must pay its own attorney fees unless a contract or statute provides otherwise. (Code Civ. Proc., § 1021; *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 19 (*Carr*); *Kangarlou, supra,* 128 Cal.App.4th at p. 1178; *Schoelkopf, supra,* 128 Cal.App.4th at p. 151.) " 'Where a contract provides for attorney fees in an action to enforce the contract, the attorney fees provision is made applicable to the entire contract by operation of Civil Code section 1717. [Citations.]'[] [Citations.]" (*Carr, supra,* at p. 19.) Under Civil Code section 1717 (§ 1717), if a contract gives one party the right to recover attorney fees in an action arising out of the contract, the other party is also entitled to fees if it prevails in the action. (*Kangarlou, supra,* at p. 1178.) Under section 1717, "parties may not limit recovery of attorney fees to a particular type of claim, such as failure to pay escrow costs." (*Schoelkopf, supra,* at p. 153; accord, *Kangarlou, supra,* at p. 1178.) But if the relevant contract clause does not put the parties to the contract on notice that it is an attorney fees clause, "section 1717 does not give all parties a right to recover attorney fees." (*Schoelkopf, supra,* at p. 152, citing *Campbell v. Scripps Bank* (2000)

78 Cal.App.4th 1328, 1337 (*Campbell*) [refusing to award attorney fees based on an indemnification clause in escrow instructions].)

It is well settled that section 1717 does not apply to an indemnification arrangement in which attorney fees are included as an item of loss in a third party claim indemnity provision. (*Carr, supra*, 166 Cal.App.4th at p. 20; *Campbell, supra*, 78 Cal.App.4th at pp. 1337-1338; see also *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1028-1031 ["essence of an indemnity agreement is that one party hold the other harmless from losses resulting from certain specified circumstances. The provisions of Civil Code section 1717 were never intended to inflict upon the indemnitee the obligation to indemnify his indemnitor in similar circumstances. Indemnification agreements are intended to be unilateral agreements. . . . "], citing *Myers, supra*, 13 Cal.App.4th at p. 973.) Unless, of course, the relevant clause reflects that the parties intended to also provide for recovery of attorney's fees in an action on the contract. (See e.g. *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1344-1346 (*Baldwin*).)

A comparison of the contract provision at issue in this case with the contract provisions at issue in *Kangarlou*, *Campbell*, *Baldwin* and *Carr*, persuades us that the clause here was intended as a third party indemnity agreement and not an attorney's fee provision under section 1717.

In *Kangarlou*, the prevailing buyer in an action against the escrow holder for breach of fiduciary duty sought attorney's fees under the following provision of the escrow instructions: "In the event of failure to pay fees or expenses due you hereunder, on demand, I agree to pay the attorney's fees and costs incurred to collect such fees or expenses." (128 Cal.App.4th at pp. 1177.) The trial court denied attorney's fees. The appellate court reversed, reasoning that, since the clause gave the escrow company the right to recover fees if a party failed to pay escrow costs, it gave the buyer the right to recover fees in an action arising out of the contract. (*Id*. at p. 1178.)

In *Campbell, supra*, 78 Cal.App.4th 1328, the escrow holder prevailed in a negligence action brought against it by the seller for failing to comply with the escrow

instructions. (*Id*. at p. 1337.) The trial court awarded the escrow holder attorney's fees under a clause in the escrow instructions which in part read: " 'If conflicting demands are made or notice served on you or any dispute or controversy arises between the Principals or with any third person relating to this escrow, you shall have the absolute right, at your election, to withhold and stop all further proceedings in this escrow without liability and without determining the merits of the demands, notices, or litigation; or sue in interpleader; or both. The Principals, jointly and severally, hereby promise and agree to pay promptly on demand, as well as to *indemnify you and hold you harmless against* and in respect of any and all litigation and interpleader costs, claims, losses, damages, recoveries, judgments, and expenses, including, without limitation, *reasonable attorneys fees that you may incur or suffer, which arise, result from or relate to this escrow*." (*Id.* at p. 1336, italics added.) The court of appeal reversed the attorney's fee award, finding the relevant clause did not provide for the recovery of attorney's fees in actions between a principal and the escrow holder to enforce the escrow instructions. The clause provided for attorney's fees only in the event of litigation arising out of conflicting demands made on the escrow holder or a dispute or controversy between the principals or any third person regarding the terms of the escrow and did not "encompass the principals' obligation to pay the escrow holder attorney fees in litigation against the latter to enforce the general escrow instructions . . . ." (*Id*. at p. 1338.)

In *Baldwin, supra*, 125 Cal.App.4th 1339, sub-contractors prevailed in an action brought against them by a developer for breach of a contract that included the following provision: "The undersigned Subcontractor hereby agrees to indemnify [Baldwin] . . . against any claim, loss, damage, expense or liability arising out of acts or omissions of Subcontractor in any way connected with the performance of the subcontract . . . unless due solely to [Baldwin's] negligence. . . . Subcontractor shall, on request of [the developer] . . . but at Subcontractor's own expense, defend any suit asserting a claim covered by this indemnity. Subcontractor shall pay all costs, including attorney's fees, incurred in enforcing this indemnity agreement." The appellate court affirmed an attorney's fee award to the sub-contractors. It reasoned that the indemnity agreement not

only provided the developer with a right to indemnity for liabilities to third parties, which would not entitle the sub-contractors to attorney's fees under section 1717, but also specified that the sub-contractors were required to pay the developer "all costs, including attorney's fees, incurred in enforcing this indemnity agreement." The court in *Baldwin* reasoned that, because this phrase unambiguously contemplated an action between the parties to enforce the indemnity agreements, section 1717 was applicable and the prevailing subcontractors were entitled to attorney's fees. (*Id.* at pp. 1344-1345.)

Finally, in *Carr*, a city entered into two separate contracts with a contractor to do (1) street improvements and (2) airport improvements. (166 Cal.App.4th at p. 17.) Both contracts contained the same relevant provisions. Under the heading "Hold Harmless and Indemnification Agreement," the first provision read: "[The contractor] shall indemnify and hold harmless [the city] . . . and its officers, officials, employees, agents of the above from and against all claims, damages, losses and expenses including *attorney fees arising out of the performance of the work* described herein, caused in whole or in part by any negligent act or omission of [the contractor], any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, except where caused by the active negligence, sole negligence, or willful misconduct of [the city]." (*Id.* at p. 19, italics in original.) Under the heading "Indemnity Agreement," the second provision read: "[The contractor] agrees to indemnify and save harmless [the city] . . . their agents and employees, for and against all loss or expense (including costs and attorney fees) on account of injury or death of persons employed by [the contractor], or his subcontractors, his or their agents or employees; injury to or death of any other person; or injury to, damage or destruction of property, real or personal, including loss of use thereof. Upon demand, [the contractor] shall defend any suits or actions covered by the terms of this agreement." (*Id.* at pp. 19-20.) The court in *Carr* observed that, "at first glance" the italicized language in the first provision seemed to extend beyond third party claims, but after surveying the relevant authorities, concluded that it did not. The court reasoned that the language more closely paralleled that in the *Campbell* line of cases than that in the *Baldwin* line. (*Id.* at p. 23.)

Here, the escrow company sought attorney's fees pursuant to the following provision in the supplemental escrow instructions: "PARTIES SHALL COOPERATE: . . . If conflicting demands or notices are made or served upon you or any controversy arises between the parties or with any third person arising out of or relating to this escrow, you shall have the absolute right to withhold and stop all further proceedings in, and in performance of, this escrow until you receive written notification satisfactory to you of the settlement of the controversy by written agreement of the parties, or by the final order or judgment of a court of competent jurisdiction. [¶] All of the parties to this escrow, jointly and severally, promise to pay promptly on demand, as well as to *indemnify you and to hold you harmless from and against* all administrative governmental investigations, audit and legal fees, litigation and interpleader costs, damages, judgments, *attorneys' fees*, arbitration costs and fees, expenses, obligations and liabilities of every kind (collectively "costs") which in good faith *you may incur or suffer in connection with or arising out of this escrow*, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly, and whether at trial, or on appeal, in administrative action, or in arbitration. . . . *If the parties do not pay any fees, costs or expenses due you under the escrow instructions or do not pay for costs and attorneys' fees incurred in any litigation, administrative action and/or arbitration, on demand, they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorneys' fees are incurred before trial, at trial, on appeal or in arbitration*." (Italics added.)

This language – particularly the first italicized portion – is identical in all material respects to the clause at issue in *Campbell*. Accordingly, it does not support an award of attorney's fees. Although the second italicized portion contains language similar to that contained in the contract at issue in *Baldwin*, it still does not support the attorney's fee award. This is because the penultimate language in *Baldwin* was set forth in a single, unambiguous sentence: "Subcontractor shall pay all costs, including attorney's fees, incurred in enforcing this indemnity agreement." Here, by contrast, the sentence relied upon by the escrow company to support the attorney's fee award is not so unambiguous.

That one sentence refers to "fees, costs, or expenses due you under the escrow instructions" and to "costs and attorneys' fees incurred in any litigation . . . ." Because of its placement in a paragraph providing for third party indemnity, these references can reasonably be understood as references to the "administrative, governmental investigations, audit and legal fees, litigation and interpleader costs" referred to in the prior sentence referring to indemnity, and not to the escrow agreement generally. (Cf. *Carr, supra,* 166 Cal.App.4th at p. 16 [indemnity clause does not create right to attorney's fees despite a reference to performance of work under the contract].) Thus, we conclude that, read in context, the clause at issue here provided for attorney's fees only in the event of litigation arising out of conflicting demands made on the escrow holder or a dispute or controversy between the principals and any third person regarding the terms of the escrow and did not signal the intent of the parties to entitle the prevailing party to attorney's fees in any action brought for breach of any provision of the escrow instructions. (*Campbell, supra,* 78 Cal.App.4th at p. 1338; see also *Carr, supra,* at p. 23.)[6]

Escrow company's reliance on *Bruckman, supra,* and *Myers, supra,* for a contrary result is misplaced. In *Bruckman,* after a real estate transaction collapsed as a result of the escrow holder's errors, the seller prevailed in an action against it by the buyer. The seller then filed suit against the escrow holder for negligence, breach of fiduciary duty and indemnity for expenses incurred in the prior action. The seller prevailed again and was awarded attorney's fees pursuant to the following clause in the escrow instructions: ". . . All of the parties to this escrow hereby jointly and severally promise and agree to pay promptly on demand, as well as to indemnify you [the escrow company] and to hold you harmless from and against all litigation and interpleader costs, damages, judgments, attorney's fees, expenses, obligations and liabilities of every kind which, in good faith, you may incur or suffer in connection with or arising out of this escrow, whether said

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[6] Because we reverse the award of attorney's fees we need not address the amount of those fees.

litigation, interpleader, obligations, liabilities or expenses arise during the performance of this escrow, or subsequent thereto, directly or indirectly." The appellate court affirmed the attorney's fees award, reasoning that the provision was made reciprocal to the seller by section 1717 and that the action was tried on a breach of contract theory. (*Id*. at pp. 1059-1060.) The court in *Bruckman* was primarily concerned with whether attorney's fees were recoverable for negligence and the amount of such fees. As the case contains no substantive discussion of the attorney's fees clause, we do not find it helpful.

Myers, *supra*, actually supports buyer's position. In *Myers*, Interface commissioned Myers, a general contractor, to construct an office building. After the building was completed, various subcontractors filed mechanics liens against the property; they eventually brought suit against Interface to enforce those liens and against Myers for failure to pay amounts due under the subcontracts. Interface cross-complained against Myers and Myers cross-complained against Interface, among others. Myers prevailed against Interface in a jury trial and the trial court awarded Myers attorney's fees. (*Id*. at pp. 955-956.) After analyzing several different documents between the parties and concluding that all the attorney's fees provisions between the owner and contractor arose only in the case of indemnity against a third party claim (13 Cal.App.4th at p. 973 et seq.), the appellate court struck the attorney's fee award. (*Id*. at p. 975.)

DISPOSITION

The part of the judgment awarding Cimarron Escrow, Inc. attorney's fees and costs is reversed. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.